Supreme Court, U.S
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No. 03-1170

IN THE

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

v.

AMADA AMERICA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties are listed in the caption of the case. The parent companies of Respondent Amada America, Inc. are Amada Co., Ltd. and Amada Mechanics, Co., Ltd. Amada America, Inc. has no subsidiaries not wholly owned. No U.S. publicly held company owns ten (10) percent or more of Amada America, Inc.'s stock.

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STATEMENT OF THE CASE

A. Summary

From 1995 until March 1, 2000, Petitioner Donald Shaffer ("Petitioner") worked as a service engineer for Amada Engineering and Service, Inc. ("AESI"). On March 1, 2000, Petitioner was injured while servicing an RG 5020LD press brake (the "Press Brake") at Newco Enterprises in St. Charles, Missouri. The Press Brake was sold to Newco by Respondent Amada America, Inc. ("Amada America"). Petitioner filed his Complaint alleging product liability claims against Amada America. Specifically, Petitioner alleged that the Press Brake was defectively designed and that he was injured as a result.

After discovery, the District Court granted Amada America's motion in limine to exclude the testimony and opinions of Petitioner's sole design expert, Dr. Farid Amirouche ("Amirouche").[1] The District Court held that Amirouche's testimony and opinions did not satisfy the tests for admissibility set forth by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). Having excluded the testimony and opinions of Petitioner's design expert, the District Court held that Petitioner had failed to produce any evidence demonstrating that the Press Brake was unsafe and unreasonably dangerous, and as a result, the District Court

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[1] Petitioner states that the District Court ruled on Amada America's motion to exclude Amirouche "without holding a Daubert hearing...." Petition, p.7. However, Petitioner never requested such a hearing, nor is one required. *See Anderson v. Raymond Corp.*, 340 F.3d 520, 523-24 (8th Cir. 2003) (excluding testimony and opinions of engineer proffered as expert without holding hearing); *see also U.S. v. Solorio-Tafolla*, 324 F.3d 964, 965-66, (8th Cir. 2003).

granted summary judgment in favor of Amada America on each of Petitioner's claims.

Petitioner filed his appeal with the United States Court of Appeals for the Eighth Circuit, alleging that the District Court abused its discretion in excluding Amirouche's testimony and opinions and that the District Court erred in granting summary judgment in favor of Amada America. In an unpublished, per curiam opinion, the Eighth Circuit affirmed the District Court's judgment in all respects. *See* Petition, pp. 31-35. The Eighth Circuit subsequently denied Petitioner's motion for rehearing or for rehearing en banc.

B. Petitioner's employment

As a service engineer at AESI, Petitioner serviced six model press brakes sold by Amada America, including that at issue, as well as other press brakes, punch presses, and sheers. Petitioner and another person were the ones who installed the Press Brake at Newco. Prior to his accident, Petitioner had serviced the Press Brake at issue two times. While working for AESI, Petitioner had operated and/or serviced press brakes between 50 and 100 times prior to the time of his accident, though Petitioner has no experience in designing or manufacturing press brakes.

C. The Press Brake

A press brake bends metal. The Press Brake was designed by Amada Co. Ltd. and was manufactured by Amada Mechanics Co., Ltd. Amada America did not design or manufacture the Press Brake. Amada America sold the Press Brake to Newco in 1999. At the time of Petitioner's accident, and at the time of Petitioner's action herein, Newco was still using the Press Brake.

The Press Brake consists of two parallel side frames, which support a fixed upper beam holding tooling such as a die and a lower movable ram. A treadle bar controls the movement of the lower ram. The treadle bar, when fully

depressed, causes the lower ram to move upward and press against the upper die to bend the metal. Release of the treadle bar causes the lower ram to stop its upward movement and descend to its original position. The distance from the lowest downward movement of the lower ram to the highest upper movement is adjustable using the lower ram positioning lever located on the left side of the machine.

D. Petitioner's accident

On March 1, 2000, the day of the accident, Petitioner was at Newco, repairing a broken control switch on the Press Brake.[2] Petitioner testified in his deposition that, after completing the repair on the control switch, he was stopped by Mark Herbert ("Herbert"), a press brake operator at Newco, and told that the lower ram on the Press Brake was slipping down from its lower set point. With the Press Brake turned on, Petitioner moved the lower ram up and down several times using the treadle bar, with Herbert standing a few inches from Petitioner, looking over Petitioner's right shoulder.[3] At some point, Petitioner was injured when he placed his hand between the lower ram and the upper die.

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[2] On page 5 of his Petition, Petitioner incorrectly states that he was attempting to correct a problem with the lower beam at the time of his injury. Not only is this inaccurate (Petitioner was called to Newco to correct a broken switch), but also contradicts Petitioner's own statement on page 10 of his brief before the 8th Circuit, wherein he stated that he was at Newco to fix a broken switch.

[3] Newco had a lockout tag out procedure, which would normally have rendered the Press Brake inoperable because of the problem with the control switch. However, that Newco procedure did not apply to Petitioner, as he was the service personnel qualified and authorized to service the Press Brake. Petitioner himself noted that "in order to perform the repair ... the machine had to be in an operational mode; it could not be disconnected from the power source."

E. Petitioner's explanation of the accident

Petitioner described how the accident occurred in three separate recordings—all pointing to Petitioner's conduct in placing his hand in harm's way. Petitioner described his accident in his own two-page typed statement, entitled "My Description Of Accident On March 1st," wherein he states, "[a]s I was showing [Mark Herbert the operation of the mechanical locking device] I rested my hand on the lower ram and became completely distracted. The ram came up crushing my hand between the punch and the die."

On March 26, 2002, Petitioner demonstrated how the accident occurred in a videotaped demonstration at Newco. Petitioner stated on the videotape that "for some reason I laid my hand" on the ram; "the ram came up and crushed it." Petitioner also described how the accident occurred also during his deposition, where he testified, "I don't know what happened there. I know that my hand was in there, but I don't know if I was resting it. I don't know if I was grabbing at a bar. I don't know none of that . . . . I don't know if I lost my balance or what. I know I was talking to Mark [Herbert]." Herbert was standing within inches of Petitioner, looking over his right shoulder. Herbert testified that he did not see Petitioner slip or fall into the machine. When asked what he believed caused the accident, Herbert testified that "it was just an unfortunate accident."

Bob Bellemey, an employee of AESI and a friend of Petitioner, testified that Petitioner's accident was caused when Petitioner placed his hand between the lower ram and the die and then stepped on the treadle bar. Bellemey testified in his deposition:

> [Petitioner] said that he had f***** up. He said, 'I had finished the job and I was getting ready to pack up, and one of the operators'...'asked what did you do to fix my machine.' And he said, 'Well, come

here, let me show you.' He said he went over there and he said he grabbed the locking mechanism and put his hand on the bed of the ram, stepped on the treadle bar and was talking to the guy that was to his right and sort of behind him and then he felt pressure on his fingers and he looked up at the ram where his hand was and as he looked up then he cut his fingers off. He said it was just a stupid mistake....

F. Petitioner's sole design expert, Amirouche

Petitioner alleged in this action that the Press Brake "was unreasonably dangerous due to [various] design and manufacturing defects." On or about May 2, 2002, Petitioner produced Amirouche's Rule 26 Report identifying him as Petitioner's sole design expert. Amirouche, a mechanical engineer, was endorsed by Petitioner to testify as to the claimed defective design of the Press Brake and alternative guarding designs.[4]

1. Amirouche's lack of qualifications to testify as an expert on the Press Brake or guards or foot switches for the Press Brake

Amirouche is a mechanical engineer, specializing in the physics and dynamics of moving parts and systems, not the safe design of machines. Amirouche earned his Ph.D. in the

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[4] Amirouche offered the following five opinions: (a) the treadle bar on the Press Brake was "dangerous and unreliable" at the time of Petitioner's injury; (b) the ram on the Press Brake should have been designed in such a way to allow for hand support and serve as a safety buffer; (c) the use of a foot electric/pneumatic switch on the Press Brake would have prevented Petitioner's injury; (d) safety guards "of a mechanism/sensory nature" on the Press Brake would have prevented Petitioner's injury; and (e) a safety manual on how to operate the Press Brake should have been given to Petitioner before he serviced the Press Brake.

field of "multibody dynamics." Amirouche obtained no other formal education after his doctoral work in 1984. He has been a full-time professor since 1984.

Amirouche has never worked for a company that manufactured or designed press brakes, guards for press brakes or component parts for press brakes. Amirouche has never worked as a press brake operator and has only operated a press brake "maybe four or five times" in his life, while enrolled in a training program for undergraduate students in 1977. Of those four or five times, Amirouche never turned on those machines. He has never operated the Press Brake at issue in this case.

Additionally, Amirouche has no experience with press brake designs in his academic career as an engineering professor. He had never conducted any research on press brakes or guards for press brakes before becoming involved in this case. Amirouche has never designed a press brake, a guard for a press brake, or an electro-pneumatic foot switch for a press brake.

Amirouche has never tested press brakes in any way or published any articles or research concerning press brakes. Amirouche admitted that his book, Computer Aided Design and Manufacturing (referenced at Petition, p. 16), deals with computer numerical control programming of machines in general and would be of no use for any press brake which required an operator to run it, like the Press Brake.

Petitioner notes Amirouche's experience in 1999 on a committee for the National Institute of Health and Safety ("NIOSH"). Petition, p. 16. However, even Amirouche admitted that the NIOSH committee spent less than 40 minutes talking about press brakes over the course of two days. Any mention of press brakes occurred within the context of the committee's subject matter, which was "ergonomic factors and safety" in relation to interaction of operators and machines, including such unrelated products as

jackhammers and seats. Amirouche received no written information about press brakes during this meeting, and he could not identify any information from the committee upon which he relied in forming his opinions.

Amirouche has never testified in a case involving press brakes, guards for press brakes, or the use of electro-pneumatic foot switches for press brakes. Amirouche has only testified in one case involving electro-pneumatic foot switches at all, though that testimony pertained to patent infringement regarding a foot switch for vehicle seats, a product quite different from press brakes. He has never given testimony on any case similar to what happened to Petitioner.

Most striking about Amirouche's testimony is that, even though he has been endorsed to criticize the design of the Press Brake, he could not identify one code or standard that applied to the design, manufacture, service or operation of press brakes. In contrast, Petitioner's industrial safety expert, Mandara Savage ("Savage"), was not only able to identify the applicable design standard, ANSI B11.3-1982, for press brakes, but admitted that the Press Brake at issue met the requirements of that standard. (ANSI B11.3 is entitled "ANSI for Machine Tools-Power Press Brakes-Safety Requirements for Construction, Care and Use.")

2. Amirouche's observations and "testing" relied upon in forming his opinions

In preparation of his opinions, Amirouche's only inspection or observation of the Press Brake occurred during the March 26, 2002 inspection and videotaped demonstration at Newco. During this inspection, Amirouche took a few measurements of the Press Brake, which were so minimal that he was able to record them, along with the rest of his "analysis" of the Press Brake, on one handwritten page of notes. Amirouche's testing of the treadle bar itself was similarly superficial, consisting of stepping on the Press

Brake's treadle bar "three or four times" on the date of the inspection, nearly two years after Petitioner's accident occurred. Amirouche never operated this Press Brake (or any other press brake) at any time. At his deposition, Amirouche could not identify the location of the Press Brake's "on/off" button.

Finally, Petitioner provides a "partial list" of the materials reviewed by Amirouche in forming his opinions for this case. Petition, p. 16. However, Amirouche admitted that many of the materials he reviewed offered no assistance in forming his opinions. When questioned Amirouche could point to no materials he reviewed which were specific to the Press Brake other than the Operator's Manual and the Parts List. Amirouche admitted that he did not read all of the Operator's Manual, "just the general description in terms of how to operate the machine." Amirouche said that the Parts List "[t]echnically did not help me...."

Amirouche had not corresponded with any "designer, manufacturer or seller of press brakes about this case," nor any expert in the field. Amirouche failed to examine the industry practice regarding guards on press brakes; in fact, he could not name any manufacturers of press brakes other than his belief that Cincinnati Malicron and General Electric manufactured press brakes. Besides these two names, Amirouche could only speculate that press brakes were manufactured by manufacturers in Germany and Japan—the names of who he could not state.

In connection with his opinions in this case, Amirouche proposed several alternative designs for the Press Brake, such as a "platform" which would have prevented Petitioner's hand from being pinched between the die and the ram. However, Amirouche admitted that he did not test, build or install, or even design or sketch, such a platform for the Press Brake at issue or for any press brake. Amirouche also suggested that "sensory elements" or a "block" would

have prevented the accident, but he neither tested nor sketched either of these proposed designs. Amirouche admitted that he conducted no tests to determine if his proposed block would have any effect on, or might even damage, the internal mechanism of the Press Brake. Amirouche admitted that he did not examine how his proposed mechanical or sensory elements might affect the use of the Press Brake. He also did not know how much it would cost to manufacture his proposed mechanical or sensory elements. Finally, Amirouche could not identify one press brake manufacturer who uses his proposed design changes on any press brake.

G. Petitioner's other liability expert

Petitioner endorsed Savage, an industrial safety engineer, to testify regarding his belief as to the applicability of OSHA and an alleged violation by Amada America of an OSHA standard. Savage offered no opinions concerning the design of the Press Brake.

REASONS FOR DENYING THE PETITION

A. Summary of argument

The Petition states no compelling reason sufficient to grant a petition for writ of certiorari. To the contrary, the error complained of in the Petition consists of an alleged misapplication of a properly stated rule of law, which under Supreme Court Rule 10 is "rarely" the basis for granting a writ. (Supreme Court Rule 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Petitioner has failed to demonstrate that a relevant and significant circuit split exists on any issue appealed or that this Court should otherwise grant certiorari in the present

case. Petitioner contends that the Eighth Circuit's decision in the present case conflicts with decisions of other circuits (Petition, p. 13), though he fails to demonstrate with any particularity how any rule of law relied upon or cited by the Eighth Circuit conflicts with any particular rule of law cited by any other circuit. Similarly, Petitioner summarily contends that the decision conflicts with the Eighth Circuit's own precedent (Petition, p. 14) but again fails to show even an example of such alleged conflict.

Instead, the Eighth Circuit correctly affirmed the District Court's order excluding the testimony and opinions of Amirouche and granting summary judgment in favor of Amada America. Amirouche's testimony and opinions were properly excluded because:

(a) he has no experience in the design, manufacture, and/or testing of press brakes, foot switches for press brakes, or guards for press brakes prior to being contacted by Petitioner's counsel in relation to this case;

(b) the case at issue is the first time that he has ever been asked to evaluate the design of a press brake, a switch for a press brake or a guard for a press brake;

(c) he has not built, tested, or even sketched his proposed alternative designs;

(d) he is unaware of any manufacturer of press brakes that uses his proposed alternative designs;

(e) he is unaware of any industry standard that suggests or requires the type of designs he is proposing;

(f) he has no factual basis to conclude that the alternative designs would have prevented Petitioner's injuries, nor can he state with certainty how Petitioner's injuries even occurred in the first place;

(g) he is not qualified to express the opinion that his alternative designs are practical or feasible; and

(h) his proposed alternative designs are merely concepts being offered by one with no background or experience with the product sufficient to know whether the designs are either workable or feasible.

Based upon these factors, the District Court did not abuse its discretion in excluding Amirouche's testimony and opinions because not only is he unqualified to testify or offer expert opinions regarding the Press Brake, but Plaintiff failed to establish that his opinions and basis for opinions are sufficiently reliable.

Amirouche's testimony and opinions having been excluded, the District Court did not err in holding under Missouri law that Petitioner failed to introduce evidence to prove that the Press Brake was defective and unreasonably dangerous. Without evidence to show that the Press Brake was defective and unreasonably dangerous, Petitioner was unable to satisfy one of the required elements to state a cause of action for design defect under Missouri law. For these reasons, the District Court did not err in granting summary judgment in favor of Amada America on Petitioner's design defect claims.

This Court should deny the Petition for Writ of Certiorari because the courts below fully considered and correctly decided the issues, only questions of evidence and factual findings are involved, this Court's prior decisions are controlling, the allegedly conflicting decisions are distinguishable on their facts, the decision below follows an unbroken line of authority, and because review of an abuse of discretion is not sufficiently important to merit the Court's consideration.

B. The Eighth Circuit correctly affirmed the District Court's decision to exclude the testimony and opinions of Amirouche, and no conflict exists between the Eighth Circuit's decision and other decisions of the Eighth Circuit or of other circuits.

Rule 702 of the Federal Rules of Evidence provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The criteria for determining admissibility under Rule 702 is set forth in *Daubert* and are properly applied "not only to 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho*, 526 U.S. at 150.

Daubert firmly establishes the trial court's "gatekeeping" responsibility for determining admissibility of expert witness testimony: "[t]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* Expert witness testimony must be based on "knowledge" that does not include unsupported speculation. *Daubert*, 113 S. Ct. at 2795. In this regard, the following two-pronged analysis with respect to the admissibility of proffered expert testimony has been established:

> (1) the court must determine whether the expert is sufficiently qualified "by reason of training, education or experience" to render opinions in front of a jury; and
>
> (2) if the Court determines that the expert is qualified to express opinions on the subject matter, the Court must then examine the opinions, and the basis for the opinions, to determine as a threshold matter whether the opinions are sufficiently reliable to be admissible.

Daubert, 113 S. Ct. at 2795-96. This Court reaffirmed this test in *Kumho*, stating, "where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has 'a reliable basis in knowledge and experience of [the relevant] discipline.'" 119 S. Ct. at 1169.

Finally, as the proponent of Amirouche's testimony, Petitioner bore the burden of proving by a preponderance of the evidence that the testimony is admissible. *Daubert*, 113 S. Ct. at 2800, Fn. 10. This Court reviews the District Court's decision to exclude the testimony and opinions of Amirouche under the deferential "abuse of discretion" standard. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141, 118 S. Ct. 512, 517 (1997); and *Kumho*, 526 U.S. at 152. "[W]hether *Daubert's* specific factors are, or are not, reasonable matters of reliability in a particular case is a matter that the law grants the trial judge *broad latitude* to determine." *Id.* at 153 (emphasis added). The District Court correctly exercised its discretion in concluding that Petitioner did not establish his burden of showing that: (1) Amirouche is qualified to offer opinions regarding an alleged defective design of the Press Brake, and (2) his opinions and the basis for them are sufficiently reliable to be admissible.

1. Amirouche is not qualified to testify or offer expert opinions regarding the Press Brake at issue.

The District Court correctly prohibited Amirouche from expressing any opinion concerning an allegedly defective design of the Press Brake because he lacked the requisite "knowledge, skill, experience, training and education" required under Rule 702 and *Daubert*. Amirouche is a mechanical engineer, specializing in the physics and dynamics of moving parts and systems, not the safe design of machines, and as such is not qualified to offer opinions

concerning the design of guards on press brakes. "Expertise in the technology of fruit is not sufficient when analyzing the science of apples. The courts have excluded the testimony of engineers because their expertise was not particular to the science involved in the case." *Diviero v. Uniroyal Goodrich Tire Co.*, 919 F. Supp. 1353, 1357 (D. Ariz. 1996), *aff'd*, 114 F.3d 851 (9th Cir. 1997). Amirouche's engineering expertise is not "particular to the science involved in the case." *Id.*

Petitioner suggests that "Professor Amirouche is a highly qualified expert in the fields of machine and design safety." Petition, p. 20. However, the kinds of "experience" cited by Petitioner involve only general fields unrelated to this design defect case (biomechanics and ergonomics) and do not overcome Amirouche's utter unfamiliarity with press brakes or with this Press Brake. It is inappropriate to allow a purported expert to testify regarding design issues without design experience or expertise involving the particular product at issue. *See, e.g., Oglesby v. General Motors Corp.*, 190 F.3d 244, 247 (4th Cir. 1999) (excluding testimony of "well-qualified mechanical engineer" when engineer had no specialized experience or expertise in evaluating either automobile manufacturing processes or the strength of plastic automobile component parts); *Ancho v. Pentek Corp.*, 157 F.3d 512, 517 (7th Cir. 1998) (refusing to allow mechanical engineer with no experience designing or evaluating factories to testify as expert on industrial plant configurations); *Tokio Marine & Fire Insurance Co. v. Grove Manufacturing Co.*, 958 F.2d 1169, 1173-75 (1st Cir. 1992) (engineer not qualified to express opinion that crane was defective because he had no experience operating cranes, had never designed a crane, had never worked for a crane manufacturer, and was not an expert in crane maintenance or operation, although he had investigated over 60 crane cases and had some experience preparing design specifications for the purchasing of cranes); and *Diviero*, 919 F. Supp. at 1357 (engineer who had worked with tires for

many years not qualified to render opinion on steel belted tires where he had never conducted testing of steel belted tires and could not describe the similarities between steel belted radial tires and other tires).

Petitioner attempts to rely on the same argument as the proponents of these experts, arguing that Amirouche's experience with machines generally *ipso facto* renders him an expert on the Press Brake. *See, e.g.*, Petition, p. 21 ("Amirouche applied recognized engineering principals to his analysis of the events leading to the injury. . . ."). However, an individual "who is a mechanical engineer is not necessarily qualified to testify as an expert on any issue within the vast field of mechanical engineering.... [T]he engineer must possess 'some special skill, knowledge or experience' concerning the particular issue before the court." *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, 392 (D. Md. 2001). The bare assertion that Amirouche is a mechanical engineer does not automatically qualify him as an expert regarding any issue within that "vast field," nor does his education as a mechanical engineer by itself qualify him to testify as an expert on the subject of press brake designs, when he otherwise has had virtually no experience with press brakes or guards for press brakes. The District Court correctly concluded that Amirouche "has virtually no experience with press brakes...." (Order, p. 6).

Contrary to Petitioner's unsupported heading in his brief, there is no conflict among the various circuits on this point. Petitioner contends that "an expert is not required to have direct design experience with the product at issue" and cites *Stagl v. Delta Airlines*, 117 F.3d 76 (2d Cir. 1997), and *DaSilva v. American Brands, Inc.*, 854 F.2d 356 (1st Cir. 1988), as alleged "proof" of a conflict with the Eighth Circuit's Opinion in this case. These two cases rely on exactly the same rules of law as the Eighth Circuit did in the present case and, decided upon markedly different facts,

present no such circuit split. For example, in *DaSilva*, the First Circuit held that the district court did not abuse its discretion in admitting the testimony of the plaintiff's expert even though the expert, a mechanical engineer, had no design experience with the particular machine at issue in the case. *Id.* at 361. However, the First Circuit relied in large part upon the fact that the expert "had extensive experience evaluating and recommending safety devices for machines, and he was *familiar from prior experience with the operation of the Banbury* [the particular model machine at issue in the case]." *Id.* (emphasis added) . In contrast, Amirouche has had *no experience whatsoever* with this model Press Brake before becoming involved in this case, nor has he had any experience building or designing guards for press brakes. These two facts alone distinguish this case and *DaSilva*.

Petitioner's reliance on *Stagl*, 117 F.3d at 76, is similarly misplaced. There, the plaintiff claimed that she was injured by an unreasonably unsafe baggage delivery system. *Id.* at 82. The plaintiff's expert, an engineer specializing in the field of "interaction between machines and people," opined that the process established by the defendant for pickup of luggage created an unreasonably unsafe condition. *Id.* The Second Circuit reversed the District Court's exclusion of the expert, holding that the expert was sufficiently qualified because "this interaction between people and machinery is clearly of the sort that [the expert] has worked with in depth." *Id.* *Stagl* did not hold that an expert is qualified despite his utter lack of any experience with a subject, as Petitioner suggests. Rather, the expert in *Stagl* regularly worked with and studied the source of the injury therein (the negligent design of a method of interaction between people and machinery). In contrast, Amirouche's opinions were directed to design and alternative designs even though he has no experience with design or operation issues for the Press Brake. Amirouche has never designed, built, studied or rendered an opinion on press brakes or press brake guards.

Amirouche (unlike the expert in *Stagl*) has ventured outside area of expertise and experiences by rendering his design opinions concerning a product that he could not even identify where the on/off switch was located. Simply, the Eighth Circuit's decision in this case does not conflict with *Stagl*.

2. Daubert renders inadmissible Amirouche's testimony and opinions regarding design defect.

a. Amirouche's theory has not been tested.

Amirouche has not tested his theories that the Press Brake was allegedly defective because its treadle bar was "dangerous and unreliable," and because it did not have a "buffer space" on the ram, a "foot electric/pneumatic switch," or "safety guards of a mechanism/sensory nature. "Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Daubert* at 2796. Various Courts have stated that whether the expert's theory has been subjected to the scientific method is "very significant." *See Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002); and *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565, 567 (N.D. Ill. 1993).

It is well-settled law that an expert's opinion that a proposed guard would have prevented an accident is inadmissible when the expert has failed to test the proposed guard, construct a prototype of it or even produce drawings of the proposed guard. For example, in *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076, 1084 (8th Cir. 1999), the plaintiff's purported expert sought to testify that the corn head on a combine was unreasonably dangerous because it lacked certain barriers. The court refused to admit the testimony because the expert had not constructed or sketched the suggested device, much less tested it. *Id.* Instead, the expert stated as the basis of his opinion, "I guess as an

engineer I know" what the corn head looked like running. (Similarly, when asked how Petitioner's accident occurred, Amirouche stated that he had an idea of what had happened "in [his] own mind" and that he did his analysis of the accident "in his head.")

Petitioner suggests that the District Court and the Eighth Circuit erred in relying upon *Jaurequi* because in that case, the expert "admitted that he had never observed the corn head at issue ... except from the roadside during his various trips through the Illinois countryside." Petition, pp. 11-12. However, much like that expert, Amirouche has only observed the Press Brake in operation one time (when counsel for Amada America and counsel for Petitioner were also present). Moreover, just like the *Jaurequi* expert, Amirouche was entirely unfamiliar with industry practice regarding guards. Petitioner's suggestion that *Jaurequi* is inapposite is simply incorrect.

Courts have regularly held that untested designs, like those proposed by Amirouche, cannot form the basis of admissible expert opinion as to whether such a design would have prevented a plaintiff's injuries. *See, e.g., Petzmeier v. Hennessy Ind., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) (stating that because the expert's "concepts are unfinished and untested ... any testimony from [such expert] about how his proposed design changes would have reduced [the plaintiff's] injuries is wholly speculative"); and *Tassin v. Sears, Roebuck & Co.*, 946 F. Supp. 1241, 1250 (M.D. La. 1996) (excluding the opinion of plaintiff's expert that a guard would have prevented plaintiff's injuries because the expert had never tested or reviewed tests of the guard by others but instead merely saw pictures of the product and the guard).

For example, in *Dancy v. Hyster Co.*, 127 F.3d 649, 651-52 (8th Cir. 1997), the Eighth Circuit affirmed the exclusion of an expert's testimony that the forklift used by the plaintiff

should have had a guard, because the expert had not tested his theory, had not designed the guard he was suggesting and had not seen this type of device on other forklifts. Petitioner suggests that *Dancy* is inapposite because the expert in that case had never seen the kind of guard he proposed but rather only "envisioned" it. Petition, p. 12. However, Amirouche also failed to identify even one manufacturer who uses the kinds of guards he suggests. Petitioner's suggestion that the District Court erred in relying on *Dancy* fails in light of these facts common to both Amirouche and the expert in *Dancy*.

Petitioner suggests that the Eighth Circuit decision conflicts with that in *Clark v. Chrysler*, 310 F.3d 461, 466 (6th Cir. 2002) and quotes *Clark* for the general proposition that "Daubert does not require an expert to actually come in and perform tests in every situation." Petition, pp. 13, 15. However, Petitioner's reliance on *Clark* is misplaced. First, this Court recently vacated *Clark* in *Chrysler Corp. v. Clark*, 124 S. Ct. 102 (2003). Vacated opinions are of limited, if any, precedential value. *U.S. v. Saterdalen*, 769 F.2d 494, 496 (8th Cir. 1995). Second, *Clark* is factually distinguishable. The expert in *Clark* had been involved in testing the kinds of latches at issue in the case for over twelve years; he had tested latches in the kind of accident that occurred in the case; and he was familiar with the model latch at issue. 310 F.3d at 468. These facts stand in stark contrast to Amirouche, who has never tested or designed press brakes or guards for press brakes at all, much less on this particular model Press Brake. The different facts in *Clark* and this case confirm that no conflict exists.

b. Amirouche's theory has not been subjected to peer review and publication.

Amirouche has not subjected his opinions or concepts for review by any engineers, manufacturers, or other peer groups. In fact, Amirouche admitted in his deposition that he has not so much as spoken or corresponded with any

"designer, manufacturer or seller of press brakes about this case," nor any expert in the field. Nor does he have any patents on the design of press brakes, guards for press brakes or foot switches for press brakes. While, as the *Stanczyk* Court points out, the closest proxy for peer review is industry practice, *Stanczyk*, 836 F. Supp. at 567, Amirouche has not examined the industry practice regarding guards on press brakes. Because Amirouche's theories have not been subjected to peer review and publication, these theories are not reliable under *Daubert* and Rule 702.

Petitioner suggests that the Eighth Circuit's decision in the present case conflicts with that of the Seventh Circuit in *Smith*, 215 F.3d at 720-21, because *Smith* states that when an expert's opinion and testimony are "based on his extensive practical experience in [the relevant] area, rather than novel methodology subject to publication, his failure to publish does not cast doubt on the reliability of his analytical technique." Petition, pp. 13-14. In other words, *Smith* states that an expert's failure to publish can be overcome if the expert has practical experience in the particular area in question. Such a rule does not help Amirouche. Amirouche has neither published anything relevant to his opinions in this case, *nor* does he have any meaningful experience with press brakes or guards for press brakes. Amirouche's lack of experience *and* publication renders Petitioner's reliance on *Smith* misplaced.

c. There is no known or potential rate of error for Amirouche's theory.

Because Amirouche has not drawn, designed or tested the alternative designs he proposes for the Press Brake, there is no known rate of error. Amirouche's proposed designs, which he admitted remain "in his head," cannot be subjected to any kind of testing until actually produced and installed on the model Press Brake at issue, or at least on a press brake similar to the one at issue. Additionally, Amirouche has not

determined whether his guards would affect the usability and effectiveness of press brakes, or even whether his proposed "block" guard would damage the internal mechanisms of the Press Brake. Courts regularly refuse to admit testimony that fails to consider the effects of a proposed design. *See Jaurequi*, 173 F.3d at 1084; *Peitzmeier*, 97 F.3d at 297; and *Tassin*, 946 F. Supp. at 1250. Because there is simply no way to establish even a potential rate of error, Amirouche's testimony was properly excluded for this reason as well.

d. Amirouche's theory has not been generally accepted.

Amirouche cannot possibly be familiar with whether his proposed guard designs are generally accepted in the industry, because he demonstrated in his deposition to be utterly unfamiliar with the industry in the first place. Instead of demonstrating any proof of general acceptance of Amirouche's theory that certain guards should have been used on this Press Brake, Petitioner claims that such general acceptance is demonstrated by regulations stating that dangers on machines should be guarded. For example, Petitioner points to OSHA regulation 29 C.F.R. 1910.212(a), which states that "one or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area." Petition, pp. 23-24. This endorsement that machines generally should employ guarding fails to support Amirouche's proposal of specific guards for a specific model press brake. The generality of that regulation is emphasized by its inclusion of such hazards as "rotating parts, flying chips, and sparks" (Petition, p. 24), none of which occur with the Press Brake. An OSHA regulation equally applicable to nearly all industrial machines cannot possibly serve as proof of acceptance of Amirouche's particular guards for a specific press brake.

Plaintiff cites *Murphy v. L & J Press Corp.*, 558 F.2d 410, 411 (8th Cir. 1977), as alleged evidence of the general

acceptance of Amirouche's theory. Petition, pp. 22-23. *Murphy* merely states that "failure to provide a safety factor in a machine's design ... can constitute a 'defective condition'...." *Id.* Again, *Murphy* provides no support for Amirouche's particular theories about a specific model press brake. First, *Murphy* does not make anything mandatory, but merely states that "failure to provide a safety factor ... can constitute a 'defective condition...." *Id.* (emphasis added). Moreover, *Murphy* fails to mention the model Press Brake at issue, much less recognize the availability and feasibility of the types of machine guarding advocated by Professor Amirouche. At most, *Murphy* supports the conclusion that the failure to guard machines (generically) may constitute a design defect. *Murphy* does nothing to indicate acceptance of Amirouche's particular theories.[5]

3. Amirouche's opinions have no factual foundation or support but, instead, are based on pure speculation.

It is well-settled law that "[e]xpert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis." *J.B. Hunt Trans., Inc. v. General Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001). That is, "opinions of an expert need not be accepted when they are based on nothing more than personal opinion or belief, instead of an understandable scientific basis." *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382, 1393 (W.D. Mo. 1994). Expert testimony is not reliable when it is

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[5] Petitioner's quotation of *Romero v. Cincinnati, Inc.*, 171 F.3d 1091, 1094 (7th Cir. 1999), for the proposition that the failure to provide a "necessary device" can "render a product unreasonably dangerous," similarly does not assist Petitioner's arguments. Petition, p. 14. Like *Murphy*, *Romero* does not say anything about the absence of particular guards from a particular machine. *Romero* likewise does not demonstrate acceptance of Amirouche's theories.

"premised on fundamentally unsound bases or *a fatally deficient amount of data*." *Id.*

Amirouche's opinions rely on exactly that kind of "facially deficient amount of data." Amirouche only spent an hour and a half at the plant where the Press Brake was located, at which time Plaintiff, Plaintiff's counsel, and Amada America's counsel and expert were also present. Amirouche did not operate the Press Brake. Instead, he took a few measurements of the Press Brake and made a rough sketch of the machine. Amirouche recorded his entire "analysis" of the Press Brake from that visit on **one handwritten page of notes**. Amirouche also stated he was "satisfied with what [he'd] done" in preparation for forming his opinion.

Essentially, Amirouche formed his belief that the Press Brake was defective by merely "eyeballing" the Press Brake. "Eyeballing" a product to determine if it is defective does not satisfy the stringent criteria of *Daubert*. *See Diviero*, 919 F. Supp. at 1360 (excluding expert testimony because "in essence he examined the tire, found the belt to be separated and then appeared to leap to the conclusion that it was defective..... This does not meet the mark under Rule 702."); *Dennis v. Pertec Computer Corp.*, 927 F. Supp. 156, 160-61 (D. N.J. 1996) (excluding testimony of expert where his "unrecorded mental methodology amount[ed] to nothing more than unsupported speculation"); *Pomella v. Regency Coach Lines, Ltd.*, 899 F. Supp. 335, 343 (E.D. Mich. 1995) (rejecting an "eyeballing" approach as "unscientific").

Amirouche's review of the case consisted of one brief conversation with Petitioner and conversations with Petitioner's attorney, receipt of certain discovery produced to him by Petitioner's counsel, an Internet search on the subject of press brakes, as well as inspection of the Press Brake for about an hour and a half. That is, essentially all the information Amirouche has relating to the accident is

information conveyed to him by Petitioner's counsel. Instead of such imprecise observation and conjecture, admissible opinion testimony must be based on scientific observations, tests, studies, or experiments. *Chapman*, 297 F.3d at 688. "[T]he absence of any testing indicates that [Amirouche's] proffered opinions cannot fairly be characterized as scientific knowledge. **Personal observation is not a substitute for scientific methodology and is insufficient to satisfy *Daubert's* most significant guidepost.**" *Id.* (emphasis added). Thus, Amirouche's opinions have no factual foundation but instead are based on pure speculation which does not satisfy Rule 702 or *Daubert*.

C. The Eighth Circuit correctly affirmed the District Court's grant of summary judgment in favor of Amada America, and no relevant conflict exists concerning the Eighth Circuit's decision.

After excluding the testimony and opinions of Amirouche, the District Court correctly found that "the record is devoid of any admissible evidence as to the second element [of a design defect claim]—that the press brake was in a defective condition that made it unreasonably dangerous to operate." District Court Order, p. 12.

1. Petitioner was required to produce evidence supporting each element of a design defect claim to withstand summary judgment.

To state a claim for design defect under Missouri law, Petitioner must prove that: (1) Amada America sold the Press Brake in the course of its business; (2) the Press Brake was in a defective condition that made it unreasonably dangerous when put to a reasonably anticipated use; (3) the Press Brake was used in a manner reasonably anticipated; and (4) Petitioner was damaged by the defective condition that existed when the Press Brake was sold. *Rauscher v. General Motors Corp.*, 905 S.W.2d 158, 160 (Mo. Ct. App. 1995). Failure to introduce evidence to establish any one of

these elements is fatal to a design defect claim and warrants summary judgment in favor of the Defendant. *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 510 (8th Cir. 1995), *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Because Petitioner failed to introduce any admissible evidence concerning the alleged defective and unreasonably dangerous condition of the Press Brake, the District Court properly granted summary judgment in favor of Amada America.

2. Petitioner failed to produce evidence demonstrating that the Press Brake was unsafe and unreasonably dangerous.

As argued to the District Court and 8th Circuit, Petitioner alleges that the mere fact that the Press Brake lacked certain guards constitutes evidence of a defective condition. *See, e.g.*, Petition, pp. 17, 25 (listing various guards allegedly available for the Press Brake).[6] Petitioner also argues that certain OSHA and ANSI standards, which arguably support the general proposition that *machines generally* should be guarded,[7] provide evidence of the alleged defective and unreasonably dangerous condition of *this particular Press Brake*. Petition, pp. 27-28. However, none of these "facts" satisfy the second element of proving a products liability action under Missouri law.

"Whether a product is unreasonably dangerous is the determinative factor in a design defect case." *Pree v. Brunswick Corp.*, 983 F.2d 863, 865 (8th Cir. 1993). "For

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[6] The record indicates that the Press Brake was indeed equipped with guards. As such, not only is Petitioner's argument without merit, it is also inaccurate and misleading.

[7] These standards do not refer to the Press Brake specifically, and the OSHA regulations do not refer to press brakes at all.

purposes of imposing liability under Missouri's law of strict liability, a product's design is deemed defective when it is shown that the way that the product has been designed renders it unreasonably dangerous." *Pree*, 983 F.2d at 865 (*citing Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 375 (Mo. 1986)). A product is defectively designed if it creates an unreasonable risk of danger to the user when put to normal use. *Linegar v. Armour of America, Inc.*, 909 F.2d 1150, 1153 (8th Cir. 1990).

a. The District Court excluded Petitioner's only evidence on design defect, the testimony and opinions of Amirouche, because it failed the Daubert analysis.

As the District Court correctly noted, the fact that an accident occurred, standing alone, does not establish that a defective and unreasonably dangerous condition existed. *Winters v. Sears, Roebuck & Co.*, 554 S.W.2d 565, 571 (Mo. Ct. App. 1977). A finding of defect cannot rest on conjecture or speculation that some defect must exist just because an accident occurred. *Crump v. MacNaught P.T.Y., Ltd.*, 742 S.W.2d 532, 534 (Mo. Ct. App. 1987). Petitioner's accident involved a complex piece of industrial machinery. The District Court held that in such a case involving a complex machine, "[Petitioner] needs competent expert testimony to establish that this press brake is defective and unreasonably dangerous." Order, p. 13. Absent Amirouche's testimony and opinions, the record contains no other admissible evidence concerning an alleged defective and unreasonably dangerous condition of the Press Brake. Accordingly, the District Court did not err in granting summary judgment where Petitioner failed to produce such

"competent expert testimony," or any other evidence of a defect.[8]

b. Evidence of other available guards is irrelevant to the question of whether the Press Brake was unreasonably dangerous.

It is well-settled under Missouri law that "a manufacturer is not obliged to adopt only those features which represent the ultimate in safety or design." *Morrison v. Kubota*

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[8] Petitioner suggests that the failure to produce expert testimony on design defect does not necessarily warrant summary judgment in favor of Amada America, citing *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 416 (3d Cir. 1999), in support. Petition, pp. 27-28. However, in that case the Third Circuit applying Pennsylvania law expressly limited its holding to the facts of that particular case, stating that "*we hold only that on the record before us*, we cannot exclude the possibility that plaintiff's non-expert evidence will be sufficient to submit his claim of defect to the jury." 186 F.3d at 416 (emphasis added). Such "non-expert evidence" included a report from the defendant's engineering manager responsible for the design of the machine in that case "addressing problems with the machine that injured Padillas, including safety concerns." That limited holding cannot be extrapolated to the present case, with its different facts. For instance, Petitioner cites no testimony from anyone at Amada America claiming any safety concerns about the Press Brake (if anything, such evidence has been consistent, that Press Brake is a safe product). Second, the *Padillas* court stated that the product in question was simple enough to be understood by the jury without expert testimony or opinion. *Id.* In contrast, the District Court here specifically held that the Press Brake is a "complex piece of industrial machinery." Petitioner's proffered defect theory is not self evident from just looking at machine – in that it requires admissible expert testimony explaining design, appropriate use for the application at Newco, practicability and feasibility for the Press Brake and whether such proposed design alternations would cause additional injuries or problems. Petitioner, however, offered no such testimony or evidence. The District Court specifically looked at all of the evidence available to Petitioner held that such other evidence was *not* sufficient to establish design defect. *Padillas* is therefore inapplicable to the present case.

Tractor Corp., 891 S.W.2d 422, 426 (Mo. Ct. App. 1994) (holding that the mere availability of a rollover guard did not render a tractor manufactured without one defective); *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 348 (Mo. 1964) (load binder not defective and unreasonably dangerous because it failed to incorporate an available anti-kick-back device). Petitioner's allegations that the Press Brake was not equipped with every available device, even if true, do not satisfy the second element of a design defect claim.

Petitioner again relies upon the argument that certain guard-type devices were available for the Press Brake, and that a failure to guard *may be* a design defect and a jury *may find* the unguarded press brake unreasonably dangerous. Yet Missouri law clearly states that a claim that a manufacturer did not provide every possible safety device does *not* constitute evidence of a design defect. Petitioner was thus left to propose possibilities about what a jury "could" or "might" find but failed to produce any evidence that would have provided a jury with any reasonable basis for such findings. Such a speculative or conjectural claim, unsupported by actual evidence, is exactly the kind of claim summary judgment is intended to resolve. The District Court correctly noted, "The law is not so rigid as to require a manufacturer to sell only those products equipped with every available safety device." Order, p. 12, *citing Linegar v. Armour of America, Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990) (stating that "[a] manufacturer is not obliged to market only one version of a product, that being the very safest design possible."

c. The District Court correctly held that Savage, Petitioner's expert on service procedures, did not provide evidence regarding the question of design defect.

Petitioner also suggests that the opinions of Savage, Petitioner's proffered expert on the applicability of OSHA

and an alleged violation by Amada America of an OSHA standard, provide evidence to withstand summary judgment. Petition, p. 27. The District Court correctly found that that "Savage ...does not provide sufficient expert testimony regarding the allegedly defective condition of the [Press Brake] to save the case from summary judgment." Savage's testimony and opinions have nothing to do with the *design* of the Press Brake. Savage admitted in his deposition that he was offering no opinion regarding the design or manufacture of the Press Brake. Therefore, by his own admission Savage's opinions cannot possibly provide evidence of design defect or an unreasonably dangerous condition created by the *design* of the Press Brake.[9]

d. The OSHA regulations cited by Petitioner, which are not relevant to this case, and the ANSI standard cited, which applies only to press brakes generally, does not provide evidence that this particular Press Brake was defective or unreasonably dangerous.

Finally, Petitioner argues that certain OSHA provisions and ANSI B11.3 provide evidence that this particular Press Brake was defectively designed. First, OSHA does not apply in this case (because Amada America was not Petitioner's employer at the time of the accident). *See McKinnon v. Skil Corp.*, 638 F.2d 270, 275 (1st Cir. 1981); *Prince v. Thomas*, 25 F.Supp.2d 1045, 1049 (N.D. Cal. 1997). Even if they did apply, 29 C.F.R. 1910.147 and 29 C.F.R. 1910.212 say nothing about press brakes, much less this particular model Press Brake. Instead, they address only an employer's responsibility to provide guarding on machines generally.

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[9] (Savage's opinions relate only to the *service procedure* set forth in the service manual. Even Savage admitted that the design of the Press Brake *conformed* with the applicable ANSI standard.)

Similarly, although ANSI B11.3 does pertain to press brakes generally, it does not propose specific guards for specific press brakes, including this Press Brake.

Petitioner reliance on *Murphy*, 558 F.2d at 410-11 and *Duke v. Gulf and Western Mfg. Co.*, 660 S.W.2d 404 (Mo. Ct. App. 1983), for the proposition that these standards are admissible, is misplaced. *Murphy* held that OSHA and other standards may be admissible to demonstrate the *feasibility* of machine guards. *Id.*, 558 F.2d at 411 ("The use of these standards for this limited purpose is clearly admissible...as it relates to the *feasibility* question, i.e., could L & J have feasibly included some form of protective device on the press"). Feasibility was not an issue in this case; the question of whether Amada America *could have* included more guards on the Press Brake has nothing to do with the question of whether the Press Brake was in a defective condition. The availability of other guards is irrelevant to that question. *Morrison*, 891 S.W.2d at 426. These general standards do not constitute evidence of a design defect. Accordingly, the District Court did not err in finding that Petitioner failed to satisfy this element of a design defect claim under Missouri Law.

CONCLUSION

For all of these reasons, Respondent Amada America, Inc. respectfully requests that this Court deny Petitioner Donald Shaffer's Petition for Writ of Certiorari and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DONALD SHAFFER,

Petitioner,

v.

AMADA AMERICA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR SANCTIONS FOR MAKING A FALSE STATEMENT TO THE COURT AND FOR LEAVE TO SUPPLEMENT THE RECORD

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I. INTRODUCTION

Respondent Amada America, Inc. ("Amada America") respectfully requests that the Court deny Petitioner Donald Shaffer's ("Petitioner") motion for sanctions for making a false statement to the Court and for leave to supplement the record. On February 10, 2004, Petitioner filed his Petition for Writ of Certiorari. On March 16th, Amada America timely filed its Brief in Opposition to Petition for Writ of Certiorari ("Amada America's Brief").

Petitioner's motion for sanctions should be denied because the statement for which Petitioner seeks such sanctions is true and supported by the record in this case. Petitioner's motion refers to footnote 6 on page 25 of Amada America's Brief, which states that the press brake at issue in this case (the "Press Brake")[1] was equipped with guards. As was done during his briefing in the District Court, Eighth Circuit, and now in this Court, Petitioner made overbroad statements that are not supported by the evidence. The statement in Petitioner's brief that " . . . the machine was not equipped with any type of guard . . .," is not accurate. This industrial Press Brake, which was installed by Petitioner in 1999, did have guards.

Nowhere in any of the briefs filed in the District Court, Eighth Circuit, and now in this Court, has Amada America contended that Petitioner's expert's proposed alternative designs were on the Press Brake at the time of accident. Had there been such a contention, the evidence and briefing would have been different in the District Court, Eighth Circuit, and this Court. But to claim, as Petitioner has done, that a new industrial Press Brake installed approximately one year prior to Petitioner's accident was not equipped "with any type of guard" is misleading and inaccurate. For example, as recited below, the testimony of Peter J. Schwalje (Amada America's

[1] Petitioner bases his products liability claims in this lawsuit on injuries he sustained in an accident which occurred while he was servicing the Press Brake.

expert witness) and testimony by Mark Herbert support the statement that this one year old Press Brake had a guard. Accordingly, to say that there was no guard on the Press Brake is not correct, but rather what Petitioner is and has contended is that the Press Brake is allegedly defective because it did not have the proposed alternative designs on the machine suggested by his expert. Petitioner's contentions of defect were addressed in the briefing to the District Court, Eighth Circuit, and this Court. However, a true and accurate statement supported by the record does not constitute an intentionally deceptive or misrepresentative conduct for which sanctions can be imposed. Petitioner has not demonstrated that sanctions are warranted for a statement that is not false or misleading.

Petitioner's motion for leave to supplement the record should also be denied. Petitioner seeks leave to supplement the record with an advertisement for the sale of a foot switch for press brakes sold by Amada America. However, the information set out in the advertisement is, at best, merely cumulative of evidence already contained in the record. Moreover, for some time Petitioner has had within his possession the very kind of evidence that foot switches like the one in the advertisement were available for the Press Brake. Specifically, (1) Petitioner testified that he offered Newco the opportunity to purchase a foot switch prior to his accident, (2) Amada America's employees testified about the availability of an electric foot switch for the Press Brake, and (3) on September 27, 2002, Amada America produced in discovery to Petitioner's counsel a document entitled "Retrofit Accessories Catalog" which has a picture of the electric foot switch with the same description Petitioner is now attempting to supplement the record. Because the advertisement is merely cumulative of evidence already submitted, this Court should deny Petitioner's motion for leave to supplement the record.

II. ARGUMENT

A. Amada America has made no false or misleading statement.

Petitioner's suggestion that Amada America has made a false or misleading statement to the Court is incorrect and misconstrues the plain language of Amada America's brief. Petitioner's motion refers to footnote 6 on page 25 of Amada America's Brief, which states as follows: "The record indicates that the Press Brake was indeed equipped with guards. As such, not only is Petitioner's argument without merit, it is also inaccurate and misleading." Brief in Opposition to Petition for Writ of Certiorari, p. 25. Footnote 6 of Amada America's Brief is a shortened version of footnote 5 from Amada America's Brief before the Eighth Circuit Court of Appeals. Footnote 5 of that brief stated, in its entirety,

> Plaintiff notes this practice [the practice of adjusting the Press Brake's lower beam so that it would not open far enough to allow a person's fingers to enter the space between the die and the lower beam of the Press Brake] in his brief (p. 11) but then makes the inconsistent claim that 'the machine was not equipped with any type of guard.' (p. 9). As Amada America's expert, Peter J. Schwalje ("Schwalje"), noted, this practice of limiting the space between the die and the beam was in itself a type of guard for the Press Brake. App. 435.

Amada America's Appellee's Brief, p. 6.

Both footnotes are accurate in that the record reflects the practice with the Press Brake was to limit the space between the die and the ram, and such practice constituted a guard for the Press Brake. As footnote 5 of Amada America's Brief notes, Mr. Schwalje testified in his deposition that the Press Brake's die and ram were customarily set by the user of the Press Brake such that they would not open more than one-sixteenth of an inch. *See* Deposition of Peter J. Schwalje, 62:12-64:7 (referred to in footnote 5 above as "App. 435"), attached hereto as **Exhibit A**. Mr. Schwalje further testified in his deposition that this limitation on the opening between the die and the ram constituted "the most obvious" guarding system for the Press Brake. *See*

Deposition of Peter J. Schwalje, 77:24-78:20, attached hereto as **Exhibit B**. (Petitioner himself also acknowledged that the Press Brake's user customarily "adjust[ed] the lower beam so that it would not open far enough to allow a person's fingers to enter the space between the die and the lower beam," citing the deposition testimony of Mark Herbert. *See* Petitioner's Appellant's Brief, p. 7.)

Amada America included footnote 6 in its Brief (and its predecessor, footnote 5, in its Appellee's Brief) because Petitioner, throughout the various stages of this litigation, has made overbroad statements that the Press Brake was not equipped with any kind of guard. *See, e.g.*, Petitioner's Appellant's Brief, p. 9 ("As the machine was not equipped with any kind of guard...."); Petitioner's Petition for Rehearing or Rehearing En Banc, p. 10 (same); Petitioner's Petition for Writ of Certiorari, p. 6; and Petitioner's Motion, "Statement of Case" [2] (same). In 1999, this industrial Press Brake was installed new by Petitioner. It was an expensive industrial Press Brake. To say, as Petitioner has done, that the Press Brake had no guards is incorrect.

Petitioner seems to imply in his motion that Amada America is arguing that there is an issue of whether the alternative guard designs proposed by his expert were in fact on the machine at the time of the accident. At no point in any brief filed in the District Court, Eighth Circuit, or this Court has Amada America ever claimed that the Press Brake Petitioner was servicing at the time of his accident was equipped with the kinds of alternative guard designs proposed by Petitioner's expert witness, nor can footnote 6 of Amada America's Brief possibly be construed to suggest as much. The issues analyzed by the District Court and Eighth Circuit concerning guarding involved the admissibility of Petitioner's expert's testimony, including his proposed alternative designs, and the granting of summary judgment based on Petitioner's failure to

[2] The pages in Petitioner's Motion are not numbered.

establish a defect or that a defect caused his accident. Had there been a dispute of whether the guards suggested by Petitioner's expert were on the Press Brake at the time of the accident, the briefing in the District Court, Eighth Circuit, and this Court certainly would have been different. Petitioner's attempt to raise non-issue is unfortunate, but not supportive of any sanctions being imposed. Amada America included footnote 6 to address Petitioner's overbroad statement that the Press Brake had no guards whatsoever. Petitioner's inaccuracy is contradicted by both Schwalje's testimony and by Petitioner's own admission concerning the limitation on the space between the die and the ram. Footnote 6 of Amada America's Brief cannot be considered an intentional misstatement, especially given the fact that the statement is supported by the testimony and briefing in this case. For these reasons, Amada America respectfully requests that the Court deny Petitioner's motion for sanctions.

B. Petitioner has failed to demonstrate a compelling reason to permit him to supplement the record.

Petitioner has failed to demonstrate any reason for granting his motion for leave to supplement the record. Petitioner seeks to supplement the record with an advertisement from Amada America's website for a foot switch for press brakes because he alleges that "to the best of Petitioner's knowledge, [the advertisement] did not exist at the time of filing of the Petition for Writ of Certiorari … and if it did in fact exist, it was not known to counsel." *See* Petitioner's Motion, "Purpose of the Motion." However, the advertisement has, in fact, long been available to Petitioner, including that the information contained in the advertisement was produced to Petitioner in discovery over a year and half ago.

Petitioner is simply incorrect in stating that the advertisement did not exist at the time he filed his Petition for Writ of Certiorari. The advertisement Petitioner seeks to include in the record has been posted on Amada America's website since at least May 28, 2002. The

advertisement therefore has been available to Petitioner for his inclusion in the record for nearly two years. Moreover, on September 27, 2002, Amada America produced to Petitioner in response to discovery, inter alia, a document generated by Petitioner's employer at the time of the accident [Amada Engineering & Service Co.] entitled "Retrofit Accessories Catalog for Amada Machines" (attached hereto as **Exhibit C**). That document has a picture of a foot switch and uses the same language noted by Petitioner in the advertisement that he is now requesting to supplement the record. *See* Exhibit C at p. AA0497.)

Finally, the existence of such a foot switch is certainly not new information to Petitioner. Petitioner has known that Amada America offered (and still offers) for sale foot switches like the one in the advertisement. The testimony by Petitioner, Amada America's employees and expert have been consistent that although the Press Brake did not have an electric foot switch on it at the time of the accident, one could have been placed on the machine instead of a treadle bar. For example, Petitioner, who is the one who actually installed the Press Brake at Newco in 1999, testified that he suggested to Newco that it put a foot switch on the Press Brake prior to the time of his accident. *See* Petitioner's Depo. at pp. 140-142 (attached as **Exhibit D**).

As the District Court noted in its opinion granting summary judgment, the testimony of Amada America's employees did "establish that Amada offered some extra guarding devices at the time the [Press Brake] was sold to Newco, but [such testimony] does not follow from this evidence that the [Press Brake] is defective without these devices or that they would have prevented the accident that occurred here." *See* District Court's Order granting summary judgment (Exhibit to Petitioner's Motion at p. 15).

The advertisement Petitioner seeks to include in the record now establishes, at most, that a foot switch was and is available for the Press Brake. As such, this cumulative evidence

establishes nothing new. Petitioner implicitly acknowledges as much when he states that inclusion of the advertisement in the record would "*further* support plaintiff's position that the safety devises [sic] identified by Professor Amirouche are widely accepted in the industry." *See* Petitioner's Motion, "Reasons to Allow Motion to Supplement the Record" (emphasis added).

Petitioner's motion therefore fails to demonstrate any compelling reason to grant leave to supplement the record with cumulative evidence because (1) Petitioner testified that he offered Newco the opportunity to purchase a foot switch prior to his accident, (2) Amada America's employees testified about the availability of an electric foot switch for the Press Brake, and (3) on September 27, 2002, Amada America produced in discovery to Petitioner's counsel a document entitled "Retrofit Accessories Catalog" which has a picture of the electric foot switch with the same description Petitioner is now attempting to supplement the record. Because the advertisement is merely cumulative of evidence already submitted, the Court should deny Petitioner's motion for leave to supplement the record.

III. CONCLUSION

For all of the reasons stated herein, Respondent Amada America, Inc. respectfully requests that the Court deny Petitioner Donald Shaffer's Motion for Sanctions and for Leave to Supplement the Record, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

By _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by U.S. Mail, first class mail postage prepaid, this 12th day of April, 2004 to William J. Meacham, 521 St. Louis Street, Edwardsville, Illinois 62025.

_____

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

CIVIL ACTION NO. 4:01-CV-01767-CDP

- - -

DONALD SHAFFER, :

Plaintiff, :

:

-vs- :

:

AMADA AMERICA, INC., :

Defendant. :

- - -

DEPOSITION UNDER ORAL EXAMINATION OF

PETER J. SCHWALJE, P.E.

EDISON, NEW JERSEY 08817

SEPTEMBER 24, 2002

- - -

REPORTED BY: SILVIA PEREZ WAGE, CSR

- - -

JOB NO. 21445

EXHIBIT A